Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

JO-ANN HENRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. CAN A TITLED OWNER OF REAL PROPERTY WHO IS INNOCENT OF ANY WRONG DOING BE DEPRIVED OF HER PROPERTY AS A SUBSTITUTE ASSET FOR ANOTHER INDIVIDUAL WITHOUT A FULL AND FAIR HEARING THAT COMPORTS WITH BASIC ELEMENTS OF DUE PROCESS SUCH AS A HEARING AT WHICH THE GOVERNMENT BEARS THE BURDEN OF PROOF?

II. DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT MANDATE PROTECTION FOR AN INNOCENT SPOUSE, WHO IS THE SOLE OWNER OF RECORD OF PROPERTY THAT IS SUBJECTED TO FORFEITURE ONLY AS A SUBSTITUTE ASSET PURSUANT TO 21 U.S.C. § 853(p) AND, IF SO, WHAT LEVEL OF DUE PROCESS IS REQUIRED?

III. DOES THE RELATION BACK DOCTRINE APPLY TO A FORFEITURE OF A SUBSTITUTE ASSET, UNDER 21 U.S.C. § 853(p)?

IV. IS AN INNOCENT THIRD PARTY TITLE HOLDER, OF AN ASSET WHICH THE GOVERNMENT SUBJECTS TO FORFEITURE AS A SUBSTITUTE ASSET PURSUANT TO 21 U.S.C. § 853(p), ENTITLED TO A JURY TRIAL TO DETERMINE HER INTEREST IN THE PROPERTY VIS-A-VIS THAT OF THE UNITED STATES?

PARTIES TO THE PROCEEDING

The proceeding from which this petition is taken involved only the United States and Jo-Ann Henry. The present cause arose following the conviction and sentencing of petitioner's husband, Tom Henry, for various violations concerning Medicare and Medicaid funds. Count 36 of the superseding indictment against Tom Henry involved a criminal forfeiture pursuant to 18 U.S.C. § 982. When the government was unable to locate the $191,206.80 the jury ordered forfeit, it requested that real property titled to Jo-Ann Henry be substituted as another asset of Tom Henry. Jo-Ann Henry then filed a third party claim. Therefore, only the United States and Jo-Ann Henry are parties to this petition.

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OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 10, 1995, is unpublished and is included in the Appendix at 1a. Petitioner filed a petition for rehearing which was denied, without opinion, on October 31, 1995. The order denying rehearing is included in the Appendix at 9a.

The United States District Court for the Middle District of Tennessee entered a final order of forfeiture on September 2, 1994, a copy of which is included in the Appendix at 11a.

JURISDICTION

The petitioner seeks review of the decision of the United States Court of Appeals for the Sixth Circuit entered on August 10, 1995. (Appendix 1a).

Petitioner timely filed a petition for rehearing in the Court of Appeals. The petition for rehearing was denied by order entered October 31, 1995. (Appendix 9a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

CONSTITUTIONAL PROVISIONS

Fifth Amendment: No person shall ... be deprived of life, liberty, or property, without due process of law ...

Seventh Amendment: In suits at common law ... the right of trial by jury shall be preserved ...

STATUTES

21 U.S.C. Section 853:

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Third party transfers

(c) All right, title, and interest in property described in

subsection (a) of this section vest in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Third party interests

(n) (1) Following the entry of any order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and

extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interest of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the actions which gave rise to the forfeiture of the property under this section; or

> (B) The petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

. . .

Substitute Property

(p) If any of the property described in subsection (a) of this section, as a result of any act of omission of the defendant -

> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold or deposited with, a third party:
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

STATEMENT OF THE CASE

This case began as a criminal case for which

jurisdiction in the district court was pursuant to 18 U.S.C. § 3231. Subsequent to the conviction of petitioner's husband, Tom Henry, the government sought to enforce the forfeiture order entered against Tom Henry, by substituting the property of claimant, Jo-Ann Henry, the petitioner herein. The jurisdiction of the district court to enforce the forfeiture order was pursuant to 28 U.S.C. § 1355. The order of forfeiture against the property of the Jo-Ann Henry was entered on September 1, 1994. (Appendix 11a).

This case had its origin in the concluding chapter of the criminal trial in the matter of *United States v. Tom Henry*, et al. Count 36 of the Superseding Indictment against Tom Henry alleged that two parcels of real property, Lot 18, South Fork Estates, Map 56E, Group A, Parcels 19.00 and 20.00[1] and Map 56E, Group A, Parcel, as well as, $191,206.80 in United States currency were subject to forfeiture under 18 U.S.C. § 982.

On June 23, 1992, the trial that had begun on April 22, 1992, ended with, *inter alia*, the jury finding Tom Henry guilty of numerous counts and, in addition, as to Count 36 returned verdicts of not forfeit as to each parcel of real property and a verdict of forfeit as to the $191,206.80.

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[1] Throughout the instant substitute assets/third party claim that is the subject of this appeal, this parcel and its buildings, improvements, appurtenances, fixtures and easements has been referred to as 101 Ewing Court, Lebanon, Tennessee.

On August 25, 1992, the trial court entered a preliminary forfeiture order, ordering the forfeiture of One-Hundred Ninety-One Thousand, Two-Hundred Six Dollars and 80/100 ($191,206.80) in United States Currency. (Preliminary Forfeiture Order; Appendix 17a). On December 23, 1992, the trial court entered its First Amended Preliminary Forfeiture Order in which the court ordered the substitution of property including the property at 101 Ewing Court known also as Lot 18, South Fork Estates, Map 56 E, Group A, Parcels 19.00 and 20.00 for the One-Hundred Ninety-One Thousand, Two-Hundred Six Dollars and 80/100 ($191,206.80) found subject to forfeit by the jury. (First Amended Preliminary Forteiture Order; Appendix 14a).

On January 15, 1993, Jo-Ann Henry timely filed a petition for a hearing to review the validity of her interest in the property that had been substituted as assets for the purpose of satisfying the order forfeiting $191,206.80. On March 8, 1993, Jo-Ann Henry as third party petitioner filed a Motion to Declare Enabling Statute Unconstitutional, which challenged the constitutionality of 21 U.S.C. § 853(n) as it denied the third party petitioner her right to a jury trial to adjudicate her interest in property which was substituted pursuant to § 853(p) property of the defendant.

On April 18, 1994, the court granted in part and denied in part a motion filed by the government to dismiss petitioner's ancillary claims. Specifically, as it applies to this petition, the court denied the government's motion to dismiss the ancillary claim on 101 Ewing Court, Lebanon, Tennessee. On September 2, 1994, the court

entered a final forfeiture order ordering the forfeiture of 101 Ewing Court, Lebanon, Tennessee, as well as other items in substitution for the $191,206.80 which was found subject to forfeiture against Tom Henry by the jury in the original criminal trial of Tom Henry. The court further found that the restraining order that had been entered on August 14, 1992, should remain in effect until the payment of the $191,206.80 is satisfied. The court further found that Jo-Ann Henry should retain an interest of $23,500.00 in the property value of 101 Ewing Court. (Order; Appendix 11a).

STATEMENT OF THE FACTS

The facts pertinent to the forfeiture issue in this case are that the property at 101 Ewing Court was deeded and recorded at the time of its original purchase solely in the name of Jo-Ann Henry. Both Jo-Ann Henry and Tom Henry in their respective discovery depositions concerning this matter stated that the reason that the property was solely in the name of Jo-Ann Henry involved the fact that prior to her marriage to Tom Henry, Jo-Ann Henry owned certain real property at 1404 Linwood Dr., Lebanon, Tennessee. At the time of Jo-Ann Henry's divorce from her former husband she received this property as part of the divorce settlement. When the home at 101 Ewing Court was purchased, Jo-Ann Henry reminded her husband that they had previously agreed that if they were to sell her former residence to purchase a new home, it would be titled solely in her name so that she could protect her children's interest in her individual estate. This deposition testimony was unrebutted by the government and there was no proof of any other reason for the titling of the property in the name of Jo-Ann

Henry.[2] According to Jo-Ann Henry's deposition she provided $23,951.20 toward the purchase price of the property and used other funds from the sale of her former home for light fixtures, cabinet hardware, painting, wallpapering, etc. In addition, she lived in the home and was responsible for its upkeep. Despite this proof and the lack of a finding on this issue by the trial court, the Sixth Circuit held that Jo-Ann Henry had only nominal title. (Opinion at Appendix 2a).

REASONS FOR ALLOWING THE WRIT

I. The Taking Of Property Pursuant To 21 U.S.C. § 853 Which Was Lawfully Titled To Jo-Ann Henry Under The Bare Allegation That It Was The Property Of Tom Henry Failed To Comport With Basic Elements Of Due Process And Thus Violated Jo-Ann Henry's Rights Secured By The Fifth Amendment.

During the course of the proceedings the government continued to attempt to demonstrate that the property at 101 Ewing Court was purchased with money that had been taken out of the accounts of Tennessee Health Services, a transfer for which Tom Henry was convicted of fraud in the criminal trial. However, as finally admitted by the government in its reply to Jo-Ann Henry's response to the government's motion for reconsideration of the government's motion to dismiss Ms. Henry's ancillary petition, the theory under which the government claimed an interest in 101 Ewing Court was the theory of substitute assets which assumed that the assets involved were not used in or proceeds of the criminal activity. Therefore, at this point the origin of the funds that purchased the property at 101 Ewing Court is totally irrelevant to this case. Throughout the proceedings Jo-Ann Henry insisted that this was her property and was not the property of Tom Henry and therefor could not be substituted as an asset of Tom Henry.

A. Overview

Jo-Ann Henry, the innocent spouse of a criminal defendant against whom the jury in his criminal trial found $191,206.80 was forfeit to the United States pursuant to 21 U.S.C. § 853(a)[5], has had her residence, the real property at 101 Ewing Road, Lebanon, Tennessee, declared forfeit pursuant to Section 853(p) as the substituted property of her husband Tom Henry. Her husband, the now convicted criminal defendant, was provided the right to a jury trial on the issue of whether the $191,206.80 was subject to forfeit. *United States v. Amend*, 791 F.2d 1120, 1129 (4th Cir. 1986), *cert. denied*, 479 U.S. 930 (defendant entitled to a jury trial on whether a particular asset is forfeitable). Yet when the government decided to claim the property at 101 Ewing Court as a substitute asset, Jo-Ann Henry, the title holder to the property and innocent spouse of Tom Henry, was required to prove she was the true owner and the government was required to do no more than assert that 101 Ewing Court was the property of Tom Henry without producing any proof to support its claim.

This case raises similar issues to the case of *Bennis v. Michigan*, Supreme Court No. 94-8729, in which this Court heard oral argument on November 29, 1995. *Bennis* raised questions concerning the infringement on

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Count 36 of the superseding indictment against Tom Henry requested forfeiture under 18 U.S.C. § 982. Section 982(b) provides that the procedural administration of forfeiture under § 982 is governed by 21 U.S.C. § 853. *E.G., United States v. Ripinsky*, 20 F.3d 359, 361 (9th Cir. 1994).

the property rights of an innocent spouse and co-owner of forfeited property under Michigan's nuisance abatement statute, while the case at bar addresses the denial of due process of the forfeiture of property owned by an innocent spouse as substituted property in place of property of the malfeasant spouse under 21 U.S.C. § 853. This court has embarked on a careful review of the impact of forfeiture on the constitutionally protected rights of citizens. In addition to *Bennis*, this Court has found in *Austin v. United States*, 509 U.S. ____, 113 S.Ct. 2801 (1993), that forfeiture may violate rights under the excessive fines clause of the Eighth Amendment; in *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994), that a fine that was the equivalent of a criminal forfeiture can violate the Double Jeopardy Clause of the Fifth Amendment; and in *United States v. James Daniel Good Real Property*, 510 U.S. ___, 114 S.Ct. 492 (1993), that the *ex parte* seizure of real property violates the Due Process Clause of the Fifth Amendment. In the case at bar, as in *Bennis*, it is the constitutional rights of an innocent spouse that were trampled by truncated procedures allowed under the statute.

In evaluating the need for this Court to grant certiorari and resolve the issue presented it is important to review various anomalies inherent in the decisions of the courts below including: (1) that in this case, the property rights of the criminal defendant, Tom Henry, received the due process protection of a jury determination of the forfeiture issue, while the innocent titled owner of the property was required to prove that the substitute property was hers and not that of her

husband; (2) if this were a civil rather than criminal forfeiture case, the innocent owner would not have to prove she was a bona fide purchaser for value: however, since it was a criminal forfeiture she is held to that requirement. *United States v. Buena Vista Avenue*, ___ U.S. ___, 113 S.Ct. 1126 (1993); (3) even though the jury verdict was to "not forfeit," the 101 Ewing Court property, the government has used the back door of substitute assets to obtain that which the jury had denied it; and (4) if this were a civil forfeiture case, the government would have an initial burden of showing probable cause that the property was either used to commit or facilitate an offense, or was the proceeds of an offense; however, since this is a substitute assets case, there is no need for showing (under the civil forfeiture legal fiction) that the property is guilty or (under the criminal forfeiture requirement) that the actual owner is guilty, instead the government only had to declare that the property was Tom Henry's (even though the deed was registered to Jo-Ann Henry) and indicate that the government wanted it in place of the $191,206.80.

It is difficult to understand how, under any theory of forfeiture whether punitive or remedial, the property of the innocent spouse could become a substitute asset. Thus, it is necessary to scrutinize the statutory scheme which allows this anonally and evaluate it under principles of due process and fundamental fairness.

B. Debunking The Red Herring.

The court of appeals and the district court placed great emphasis in this matter on the government's argument that since the funds used to purchase the real

property in question were traceable to Tom Henry's corporation, Tennessee Health Services, and as such were the subject of the jury verdict against Tom Henry in Counts 4 and 6 through 13 of the superseding indictment, *a fortiori*, the property was purchased with the proceeds of the crime and, thus, Jo-Ann Henry's title must fail. (See, opinion of Sixth Circuit, n.1, Appendix at 6a). The problem with this analysis lies in the jury verdict of "not forfeit" as to the 101 Ewing Court property. This verdict barred the instant property from criminal forfeiture as proceeds of the offense and cloaked it in the status of innocence, subject to forfeiture as a substitute asset under 21 U.S.C. 853(p) only if it is the property of Tom Henry and not Jo-Ann Henry.

At the criminal trial of Tom Henry, the district court gave a special verdict instruction regarding Count 36, the criminal forfeiture Count. This instruction required the jury to specifically determine individually whether each item of property charged in the indictment, the real property at 101 Ewing Court, the adjoining lot and/or $191,206.80, was subject to forfeiture.

The jury returned a verdict of "forfeit" only on the $191.206.80. On both parcels of real property the jury returned a verdict of "not forfeit". Consequently, there has been a jury verdict that the real property at 101 Ewing Court is not subject to forfeiture. Since, the party against whom the jury verdict was rendered, the government, is identical to the party in this case, this verdict is *res judicata* and cannot now be re-litigated. Not withstanding this clear verdict of "not forfeit" on the 101 Ewing Court property, the court below relied on the theory that the property was purchased with proceeds of the criminal acts

of Tom Henry to justify its failure to consider the due process implications of the lack of any procedural protection for Jo-Ann Henry the innocent owner of the property. (Opinion, Appendix 1a).

As to Count 36 of the indictment, the trial court properly instructed the jury regarding the elements of forfeiture and the burden of proof. The court then instructed:

> If, as a result of an action or omission of the defendant, TOM HENRY, any of these above-described properties are found to be involved in, or traceable to, an offense charged in Counts Six through Thirteen, and cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the Court; has been substantially diminished in value; or has been commingled with other property of the defendant, TOM HENRY, up to the value of the property identified above, shall be forfeited to the United States pursuant to Title 18, United States Code, Section 982(b)(1)(A).
>
> *You will have noted that certain properties may be held in the name of a person other then the defendant. I charge you that you should simply disregard any such title or formal claim of ownership of such property either constituted real or personal property involved in the transactions or attempted transactions or property traceable to such*

properties.

> The right to any such property vested in the United States Government at the moment the property was acquired by way of the illegal acts prohibited in the statute. Any interest that another person may claim to have in such property can be taken into account later by this court in imposing a sentence and in disposing of the property. This is not for your consideration as Jurors. Stated differently, your sole task is to decide whether this property, regardless or whose name in which it is held, was property involved in the transactions or attempted transactions or property traceable to such properties.

(emphasis added).

Therefore, it is beyond question that the properly instructed jury in the *Tom Henry* trial found against the government on the forfeiture of the real property, by its specific finding that the real property described in the indictment was not forfeitable. *Tom Henry* had and was provided a right to a jury determination on this important issue. *United States v. Amend*, 791 F.2d at 1129. This finding constitutes *res judicata* against the government on the issue of whether this real property was subject to forfeiture as either the property involved in the offense or traceable to the offense. Therefore, both the property and the claimant in this case are as a matter of law innocent of any wrong doing and neither the trial nor appellate courts are free to substitute their judgment for

that of the jury. As a consequence the source of the funds used to purchase the 101 Ewing Court property is irrelevant. This property has taken on the same protection as any other innocent property and is subject to forfeiture only if it can be shown to be the property of Tom Henry. Jo-Ann Henry is the innocent spouse and putative owner and must be afforded due process protection.

C. As The Sole Owner Of Record To The Real Property At 101 Ewing Court, Lebanon, Tennessee, Jo-Ann Henry's Interest In The Property Is Protected By The Due Process Clause Of The Fifth Amendment To The Constitution Of The United States.

Forfeiture of property whether at common law or under the present statutory schemes is promised on an assumption that either the property is in some way responsible for any injury it causes or the owner of the property is guilty of some offense and must therefore forfeit his property. *See, Austin v. United States*, 113 S.Ct. at 2806-2810; Civil Forfeiture and Drug Proceeds; the Need to Balance Societal Interests with the Rights of Innocent Owners, 77 Marquette L. Rev. 856, 858-871 (1994). While noting the importance of forfeiture to law enforcement this Court has taken on an extensive search for fundamental fairness in the forfeiture process through its recent decisions and grants of certiorari in cases raising issues concerning forfeiture jurisprudence. *See, United States v. $405,089.23 U.S. Currency*, 33 F.3d 210, 218 (9th Cir. 1994). This case raises a yet unresolved issue

concerning the requisite due process when the government attempts to take the property of an innocent third person under the authority of substituting any other asset of the defendant as permitted by 21 U.S.C. § 853(p). In this situation neither the property nor its titled owner is "guilty" of any infraction, therefore, this owner above others must be provided with significant protection under the Due Process Clause of the Fifth Amendment.

The Fifth Amendment to the United States Constitution provides, "No person shall ... be deprived of life, liberty, or property, without due process of law." The amount of due process to which the person is entitled in any given circumstance is, of course, always the pertinent question when addressing this constitutional inquiry. Recently, this Court has addressed this issue as it pertains to seizure in a civil forfeiture proceeding in *United States v. James Daniel Good Real Property*, _____U.S. _____, 114 S.Ct. 492 (1993).

The Supreme Court observed in *Good* that "our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." 114 S.Ct. at 498. The Court concluded that there was no question that the pre-hearing seizure of a home deprived the owner of property interests protected by the Due Process Clause. *Id* at 498. This observation was made regarding a pre-hearing seizure. It is axiomatic that even greater due process protection is required before final deprivation as accrued in the case at bar. Plainly, the forfeiture of Jo-Ann Henry's home deprives her of a property interest protected by the Fifth Amendment.

Of course, the real question to which this Court must provide enlightenment is, to what level of due process does our constitution afford this third party claimant of a substitute asset. In analyzing this question as to pre-hearing seizure in *Good*, the Court noted that "Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance [citations omitted] the seizure deprived *Good* of valuable rights of ownership, including the right of sale, the right of occupancy, the right of unrestricted use and enjoyment and the right to receive rents". *Id* at 114 S.Ct. 501. Needless to say, the forfeiture of 101 Ewing Court as a substitute asset threatens a far greater private interest for Jo-Ann Henry. It triggers the loss of all rights to her home. The Court in finding that pre-hearing seizure of real property violated the Due Process Clause reviewed its prior holdings involving predeprivation hearings concerning personal property and noted the greater need when dealing with the seizure of a home. 114 S.Ct. at 501. Certainly Jo-Ann Henry is entitled to greater due process protection from a final taking than is *Good* in a pre-forfeiture seizure.

D. As Outlined Above, The Due Process Protection That Cloaks An Innocent Third Party Requires That The Due Process Analysis Of A Third Party's Position As It Applies To Substitute Assets Must Be Different From That Required When The Property In Question Is Directly Subject To Forfeit.

21 U.S.C. § 853(p) permits the substitution and

"forfeiture of any other property *of the defendant*" (emphasis added), whenever the property forfeited pursuant to § 853(a) is no longer available. In the instant case the "property described in subsection (a) is the $191,206.80. Under the statute only the property of "the defendant" Tom Henry can be substituted for the "property described." Therefore, unless the real property is the property of Tom Henry it is not subject to substitution in this matter. The salient issue concerns whether Jo-Ann Henry was stripped of her property in this instance without being afforded the requisite due process.[4] The lower courts have analyzed substitute assets only in regard to whether they are subject to pre-forfeiture seizure. While these cases are not directly on point with the circumstances of the case at bar, they are instructive. Moreover, there is a clear split in the Circuits on the treatment of substitute assets that requires resolution by this Court.

In this matter the government relied extensively on *In Re Billman*, 915 F.2d 916, 920 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2258 (1991), for the proposition that with regard to substitute assets the third party must establish status as "a bona fide purchaser for value of such property who at the time of purchase was reasonably

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Although the trial court held a hearing on Jo-Ann's third-party claim, the hearing was limited to whether Jo-Ann Henry could prove she was a bona fide purchaser for value. The burden of proof was on Mrs. Henry and as a homemaker she could not show significant income independent from that of her husband. The limitation on the scope of the hearing and the misplacement of the burden of proof denied petitioner a meaningful hearing.

without cause to believe that the property was subject to forfeiture," as set out for transfers of § 853(a) property to third parties in § 853(c). However, the limited holding of *Billman* was simply that this analysis only authorized that the property was subject to restraint *prior to trial* and not that it deprived claimant of standing. 915 F.2d at 920, 921 (emphasis added). *Billman* is also unique on its facts in that at the time the substitute assets were wired from Europe to the United States, Billman was a fugitive, a status known to the third party claimant. Moreover, the third party claimant was indicted in the same indictment, although not charged in the racketeering count that gave rise to the forfeiture. 915 F.2d at 917, 918. Although it favorably cited *Billman*, the court in *United States v. Swank Corp.*, 797 F.Supp. 497, 503, 504 (E.D.Va.1992), noted with approval that the government agreed to release a restraint on property held as tenants by the entirety due to the interest of the non-defendant spouse. Therefore, it can be assumed that the *Swank Corp.* court while following the letter of the controlling decision in its circuit, did not consider *Billman* to reach assets owned by an innocent spouse.

However, *Billman* has been severely criticized by the court in *United States v. Ripinsky*, 20 F. 3d 359, 363 (9th Cir. 1994), wherein the court notes that § 853(a) "clearly describes only forfeitable assets and not substitute assets", which the court observes are mentioned in § 853(p). In emphasizing that subsection (a) property is distinguishable from subsection (p) property the court, in characterizing the government's argument, states,

We find these arguments unavailing. In effect,

> the government asks us to interpret the phrase "property described in subsection (a)" to mean "property described in both subsections (a) and (p)", we decline to read the statute in a manner clearly contradicting to the plain statutory language. *See, [United States v.] Floyd*, 992 F.2d [498, 502 (5th Cir. 1993)].

Id.

The *Ripinsky* court notes that both the Third and Fifth Circuits have ruled opposite to the Fourth Circuit's analysis in *Billman*. *Id.* at 362 (referring to the decisions in *Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993) and *United States v. Floyd*, 992 F. 2d 498 (5th Cir. 1993).

The court in *Assets of Martin*, after noting that the plain language of the statute dictated that substitute assets were not, for the purpose of pretrial restraint, the equivalent of assets under 18 U.S.C. § 1963(a)[3], reviewed the legislative history which clearly stated a congressional intent to treat substitute assets differently than those defined as "forfeitable assets".

The *Assets of Martin* court further discussed the effect of the recent decision of *Austin v. United States* __ U.S. ____, 113 S.Ct. 2801, on the question of pretrial restraint of substitute assets, noting that "the Supreme Court's application of Eighth Amendment limitations to forfeitures suggests to us that we need to keep prosecutorial zeal for such remedies within particular

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18 U.S.C. § 1963 is the RICO equivalent to 21 U.S.C. § 853 and the analysis of each statute is identical.

boundaries". 1 F.3d at 1360, 1361. It should be noted that not only *Austin*, but other recent decisions of this Court suggest a basis of understanding of the rule that constitutional protections play in the forfeiture arena.

A trilogy of recent decisions of this Court indicates that the Court views the actual nature of the proceeding, not its official designation, as "civil" or "criminal" to determine the extent due process applies, and that due process applies even to a taking termed "civil" where the effect of the statute is punitive. *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d. 487 (1989); *Austin v. United States*, *supra*; *Department of Revenue of Montana v. Kurth Ranch*, *supra*, as noted above, if the Due Process Clause is implicated in a matter in which the historical foundation for forfeiture applies, *i.e.* either the property or the owner is culpable, then certainly it applies all the more when both the property and owner are innocent.

The *Austin* Court, in considering a civil forfeiture under 21 U.S.C. § 881 (a)(4) and (a)(7), found that these sections constituted "punishment" and therefore triggered constitutional protections under the Excessive Fines clause of the Eighth Amendment, while *Halper* considered the effect of what is putatively a civil fine following a criminal conviction under the Double Jeopardy clause of the Fifth Amendment. In each case the Court expanded the opinion of what constitutes punishments under the constitution thus triggering greater constitutional protection for the individual.

In *Kurth Ranch*, the court analyzed whether a tax imposed by Montana for the possession of illegal drugs

that was assessed by the state after it had imposed a criminal penalty for the same conduct violated the "constitutional prohibition against successive punishments for the same offense", ___ U.S. at ___. 114 S.Ct. at 1941. The Court observed that in *Halper* it held that the character of the sanction rather than the label "criminal" or "civil" was of the paramount importance. The Court noted that its decisions in *Halper* and *Austin*, among others, supported its conclusions that the tax in *Kurth Ranch* constituted an additional penalty and, therefore, was subject to the constraints of the Double Jeopardy Clause. ___ U.S. at ___, 114 S.Ct. at 1945, 1948. These three recent decisions have quite plainly changed the appropriate analysis in forfeiture cases requiring the review of forfeiture statutes to determing whether they trample on rights protected by the constitution.

As noted above, Tom Henry, the defendant in the original criminal matter was afforded a jury trial on the specific assets subject to forfeiture. Tom Henry was afforded this high level of Due Process protection because criminal forfeiture is *in personam* and is intended as part of the criminal punishment. *United States v. Amend*, 791 F.2d at 1128. It defies logic to apply more stringent rules and provide less constitutional protection to third party claims by innocent owners of innocent property who are dragged into the forfeiture proceeding by the government's mere accusation that the property is the property of the defendant rather than the titled owner, than to property that is directly subject to forfeiture because it has been found forfeit by a jury determination that the property is directly attributable to the criminal conduct.

Since, in the case of substituted assets, the property is subject to forfeiture only because it is alleged to be the property of the defendant, it deserves greater deference and care must be given to the Fifth Amendment Due Process rights of third parties maintaining an interest in the property and avoid erring against the legitimate interests of the individual. Therefore, in a substitution of assets case the protection afforded third parties in civil forfeiture is appropriate and should be applied even in the criminal forfeiture context. *See, United States v. 92 Buena Vista Avenue, supra.*

II. Jo-Ann Henry Had Superior Right, Title, And Interest In The Real Property At The Time It Became Subject To Forfeiture.

To make any sense out of the forfeiture of substitute assets in the hands of third parties the court cannot literally read 21 U.S.C. § 853(n)(6). Section 853(n) contains two subsections. Subsection 6(A) requires that the innocent owner have superior title at the time"of the commission of the acts which gave rise to the forfeiture of the property under this section; and subsection (B) requires the petitioner is a bona fide purchaser for value ... and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture".

For the purpose of a substitute asset, as in the matter herein, the time which gives rise to the forfeiture of the property must be the date on which the trial court grants the government's motion to substitute assets. If this provision were to be interpreted in any other way, then any property disposed by the defendant at any time

after the commission of the criminal conduct that triggers the forfeiture would be capable of forfeiture as a substitute asset, thus rendering the language of § 853(p), relating to substitute assets, a nullity. Section 853(p)(2) refers to the circumstance when any forfeited property referred to in § 853(a) "has been *transferred* or sold to, or *deposited* with, a third party." (emphasis added). Clearly property transferred or deposited does not refer to bona fide purchasers for value, and hence, if the language in subsection (n)(6)(A) referred to the time of the offense, it would not be out of the reach of the government for the purpose of forfeiture. Under such circumstances the noted language from subsection (p)(2) would be superfluous language if § 853(n)(6)(A) when the issue is substituted property was referring to any time other than that moment that the particular substituted property became identified as forfeited. Thus, in the case at bar, the time to look at the superior title is at the point the court granted the government's motion to substitute.

The analysis in this case is not unlike the structural analysis of the civil forfeiture statute construed by this Court in *United States v. 92 Buena Vista Ave., supra.* In *Buena Vista Ave.* the Court was required to interpret the relationship between the word "owner" in 21 U.S.C. § 881(a)(b) and the "relation-back" provision of § 881(h). In order to adequately protect an innocent owner, and thus accomplish substantial justice, the Court was compelled to determine that the innocent owner provision must be applied prior to application of the relation-back provision. *92 Buena Vista Ave.*, 113 S.Ct. at 1134-1137; Civil Forfeiture and Drug Proceeds, 77 Marquette L. Rev. at 879-881. Petitioner submits that this Court should

grant certiorari in this case to provide guidance to the lower federal courts on the relationship between 21 U.S.C. § 853(c) (relation-back), § 853(p) (substitute property) and § 853(n) (third party interests). This guidance is necessary to avoid the summary injustice that occurred in the case at bar wherein the innocent third party was deprived of her homestead without any meaningful opportunity to challenge the arbitrary declaration of the government that the property was property of her husband to which she had no interest.

III. 21 U.S.C. § 853(n) Is Unconstitutional In That It Deprives Innocent Owners A Right To A Jury Trial

Petitioner moved the trial court pursuant to the Fifth and Seventh Amendments to the Constitution of the United States, to declare 21 U.S.C. § 853(n) unconstitutional and therefore set aside the order forfeiting the real property at 101 Ewing Court, in that the denial of a right to a jury trial under 21 U.S.C. § 853(n)(2), violated the third party claimant's right to due process and to trial by jury. The Sixth Circuit concluded without any analysis that a jury trial was not required in this matter. However, for the reasons set forth below this Court should grant certiorari to consider this very important issue.

21 U.S.C. § 853(n)(2) establishes the procedure for a third party requesting adjudication of interest in property ordered forfeited to the government. The statute provides that "The hearing [to adjudicate third party interests] shall be held before the court alone, without a jury." This provision allows the government to move to forfeit property of a third party who was a

stranger to the original criminal action that led to the forfeiture. In this matter, the fact that this is property substituted for the original property forfeited in the criminal action makes it one step further removed from any property found by the jury to be involved in or the proceeds of criminal conduct. Therefore, the proper description of this action is as an action brought by the United States against an innocent property holder declaring that individual's property forfeited to the government. Petitioner contends that under this scenario, she is entitled to have her rights to the property determined by a jury. Failure to afford her that right is to take her property in violation of her right to due process under the Fifth Amendment and her right to a jury trial under the Seventh Amendment.

In *Boddie v. Connecticut*, 401 U.S. 381 (1971), this Court mandated that an "individual be given an opportunity for a hearing *before* he is deprived of any significant property interest..." 401 U.S. at 379. "Our cases further establish that a statute or a rule may be held constitutionally invalid *as applied* when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question". 401 U.S. at 380 (emphasis added). Here, the government seeks to strip an individual of her home because of the conviction of her spouse, without affording her any of the protections it conceded it owes under the federal constitution to her defendant husband.

The right to a jury trial in civil cases is guaranteed by the Seventh Amendment to the United States Constitution. In *Damsky v. Zavatt*, 289 F.2d 47 (2nd Cir.

1961), Judge Friendly set forth the historical development of the Seventh Amendment. As the court explained, the Seventh Amendment, in referring to "Suits at common law," referred to "the common law of England as of 1791." The court further indicated that when a law suit involves issues at law and at equity, the court should limit those issues for which the jury will consider to those issues at law. 289 F.2d at 48. The court then concluded that actions for debt including those allowing the government to collect taxes were suits at common law and thus entitled to trial by jury. 289 F.2d at 51.

Particularly pertinent to the case at bar is the holding in *Granfinanciera, SA v. Nordberg*, 492 U.S. 33, (1989). The Court explained that "Suits at common law" refers to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." 492 U.S. at 41. The Court continued explaining, that actions to recover preferential fraudulent transfers, in which the challenge is to the conveyance of money the action has long been viewed as an action at law to which a jury trial attaches. The court noted that actions for monetary relief were legal not equitable and therefore at common law and under the Seventh amendment the right to a jury trial applies. 492 U.S. at 43, 44.

The instant case is not unlike the matters in which the federal government seeks to collect taxes from an individual, in which the courts have repeatedly found that the issue is an action on a debt and as such should be submitted to a jury. *See, Farmers-Peoples Bank v. United*

States, 477 F.2d 752, 757 (6th Cir. 1973). In the case at bar, the action is one for payment of debt, that being the $191,206.80 that was forfeited by the jury in the original criminal matter in this case. That forfeiture was against Tom Henry. The government has asserted that they have been unable to locate $191,206.80 and, therefore, have sought the right to substitute assets under the authority of 21 U.S.C. § 853(p) and have sought to substitute, *inter alia*, the real property at 101 Ewing Court. This is, therefore, structurally a collection of a debt owed by Tom Henry. As such, the remedy is legal not equitable in that the issue to be tried is whether this property will serve as a substitute asset for the collection of the debt, and, therefore should be tried before a jury. The Seventh Amendment question is based upon the nature of the issue tried rather than the character of the overall action. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

It is uncertain whether this matter is properly considered civil or criminal. Clearly, the forfeiture as to the property of Tom Henry was criminal. As to Tom Henry this case was formally designated criminal and the question of whether to forfeit the real property at 101 Ewing Court was submitted for jury decision. As has been aforementioned, the jury said "not forfeit." However, the status of the case as criminal or civil became more complicated once the government dodged behind the jury's verdict and asked that the real property at 101 Ewing Court be substituted for the funds found subject to forfeit by the jury's verdict.

Of course, a criminal forfeiture is always considered punishment and is *in personam* rather than *in rem*. *United States v. Amend*, 791 F.2d at 1128. However,

as to the third party titled owner of the property, it is difficult to explain how a criminal action is justified. She did not violate any law, yet taking her property is certainly punishment. On the other hand, this action also defies the legal fiction inherent in *in rem* proceedings in that as a substitute asset the property cannot be considered culpable of any wrongdoing nor the proceeds of any wrongdoing. Nevertheless, this case must be considered civil for analysis of the right to a trial by jury.

CONCLUSION

For the reasons set forth above, this Court should grant petitioner Jo-Ann Henry's petition for a writ of certiorari and review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION
No. 94-6188
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee	)	
	)	**ON APPEAL FROM**
	)	**UNITED STATES**
	)	**DISTRICT COURT**
v.	)	**FOR MIDDLE**
	)	**DISTRICT OF**
	)	**TENNESSEE**
TOM HENRY,	)	
	)	
Defendant,	)	
	)	
JO-ANN HENRY,	)	
	)	
Claimant-Appellant	)	

BEFORE: KRUPANSKY, MILBURN, and BATCHELDER, Circuit Judges.

PER CURIAM. Claimant-appellant appeals the district court's order forfeiting substitute assets of defendant. For the reasons that follow, we affirm the district court's order.

I.

Defendant, Tom Henry, purchased a house for himself and his family at 101 Ewing Court in 1989 for $195,000. From the time the property was first purchased, the deed and property title were recorded solely in the name of claimant-appellant Jo-Ann Henry, the wife of Tom Henry. Jo-Ann henry alleges that at the time Tom Henry bought the 101 Ewing Court residence in 1989, she insisted that title to the property be recorded in her name alone. She claims that she intended to retain title in the property to replace her interest in another house, acquired from her previous marriage that she had just sold, and to provide a home for her children to grow up in and eventually inherit. According to Tom Henry, the 101 Ewing Court residence was titled in his wife's name in order to provide her with financial security and because of his affection for her.

As the Government points out, however, despite Jo-Ann Henry's claim that she is the sole owner of the 101 Ewing Court residence, Tom Henry admitted that the funds used to purchase the house came from his companies, not from his wife. And not only did Tom Henry expend the money to buy the new house, the Government traced those funds to the illegal activity of Tom Henry. The Government thus correctly contends that Jo-Ann Henry holds only nominal title in the 101 Ewing Court property.

This criminal forfeiture action resulted after Tom Henry was convicted of money laundering related to a Medicare fraud scheme, and ordered to forfeit $191,206.80 in U.S. currency to the U.S. Government. When it became clear that the cash could not be

recovered from Tom Henry, the Government filed a motion to forfeit substitute property including the real property located at 101 Ewing Court, the property at issue in this appeal. According to the Government, Tom Henry had transferred proceeds of his criminal activity to various third parties including his wife, Jo-Ann Henry. The court entered an amended preliminary order on November 20, 1992, ordering the forfeiture of substitute property including 101 Ewing Court.

On January 15, 1993, appellant, Jo-Ann Henry filed a petition for a hearing to adjudicate her alleged third-party interest in property targeted by the amended forfeiture order, including 101 Ewing Court. Appellant Jo-Ann Henry filed a second motion on March 8, 1993, asking that the district court declare the enabling statutes, 18 U.S.C.A. § 1963(1) and 21 U.S.C.A. § 853(n), unconstitutional. After an ancillary hearing was held, the court entered a final order of forfeiture of the property at 101 Ewing Court, but specifically excepted from forfeiture Jo-Ann Henry's legal interest in the property of $23,951.20. Appellant Henry then filed this timely appeal.

II.

This forfeiture action is governed by 21 U.S.C. § 853. Section 853(p) is termed the "substitute asset" provision, and reads in relevant part:

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant---

> (1) cannot be located upon the exercise of due diligence;
> (2) has been transferred or sold to, or deposited with, a third party;
> (3) has been placed beyond the jurisdiction of the court;
> (4) has been substantially diminished in value; or
> (5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).
21 U.S.C.A. § 853(p) (West Supp. 1995) (emphasis added). The second section at issue in this case defines third party interests:

(n) Third party interests

. . . .

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that --

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant **or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the**

> property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

21 U.S.C.A. § 853(n)(6) (West Supp. 1995) (emphasis added). Thus, the substitute asset provision, § 853(p), permits a court to substitute assets of the defendant for forfeitable property, while § 853(n)(6) protects third parties by giving them the opportunity to prove that they are innocent owners of property to be forfeited.

Appellant alleges that she held superior title in the Ewing Court property over that of her husband, the defendant in this action. We find that appellant was not a bona fide purchaser of the Ewing Court property, but rather holds only bare legal title in the property that the defendant purchased with proceeds of his illegal activity. In *United States v. 526 Liscum Drive,* 866 F.2d 213 (6th Cir. 1989), the claimant also held legal title to real property. This Court found, however, that unless claimant could prove some dominion or control over the property, or some other indicia of true ownership, she was nothing more than a nominal or straw owner.
526 Liscum Drive, 866 F.2d at 217. As we observed, the purpose of forfeiture statutes is to "deprive criminals of the tools by which they conduct their illegal activities... A failure to look beyond bare legal title would foster

manipulation of nominal ownership to frustrate this intent." *Id.* (citations ommited).

Jo-Ann Henry testified that her only contribution to the payment price was the amount of $23,951.20. In addition, the special verdict indicated the jury's belief that Tom Henry had purchased the house with illegally obtained funds. Consequently, appellant did not hold superior legal title in the property "at the time of the commission of the acts" which gave rise to the district court's forfeiture order.

We are not persuaded by appellant's argument that § 853(n)(6)(A) should be read to measure Jo-Ann Henry's legal right at the time the court grants a motion to substitute an asset. The essence of Jo-Ann Henry's argument is that the relation-back doctrine should not be applicable in the forfeiture of a substitute asset. We need to reach this precise question at this time, however, because the substitute asset at issue in this case--the 101 Ewing Court residence--was purchased with funds illegally obtained by the defendant. The Ewing Court property is therefore directly traceable to defendant Tom Henry's illegal actions. We can be assured of the property's traceability by the jury's special verdict finding that the Ewing Court property was obtained with illegal funds.[1]

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[1]The jury's verdict with regard to Count Thirty-Six, indicating that the Ewing Court property was not forfeitable, does not interfere with the jury's verdict with regard to Count Four that the property was obtained by illegal funds. Nor does the fact that the jury indicated that the property should not be forfeited preclude the forfeiture of 101 Ewing Court as a substitute asset in light

For the same reason that relation back is applicable to this substitute asset, any marital property right that Jo-Ann Henry might have had in the Ewing Court property is also defeated by the fact that the residence is directly traceable to the defendant's illegal activity. Finally, because the property was
purchased with illegal funds, the statutes clear and unambiguous language instructs that the alleged superior legal interest must be measured at the time that the illegal acts were committed. *United States v. Campos,* 859 F.2d 1233, 1239 (6th Cir. 1988).

Appellant further alleges that her constitutional right to due process has been violated because she was denied her right to a jury trial and because a claimant such as herself should not bear the burden of proving her superior legal interest in the property. Once again, appellant's arguments run counter to the language of the statute itself which provides third parties the opportunity to obtain an ancillary hearing before the court but as § 853(n)(2) states, "[t}he hearing shall be held before the court alone, without a jury." 21 U.S.C.A. § 853(n)(2) (West Supp. 1995). We do not find this statue's denial of a jury trial to be unconstitutional. As the Supreme Court has stated, the Seventh Amendment "was never intended to establish the jury as the exclusive mechanism for fact finding in civil cases." *Atlas Roofing Co., Inc. v. OSHA,* 430 U.S. 442, 460 (1977). Appellant's petition challenging the district court's forfeiture order is not the type of action which necessitates a jury trial; thus as long as the claimant

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of direct evidence and proof that the property was purchased with illegal funds.

is provided with an ancillary hearing, no constitutional right is violated.

Finally, the jury verdict indicating the Ewing Court residence should not be forfeited does not prevent the forfeiture of the property as a substitute asset. The jury's verdict of "not forfeit" did not determine whether the residence could be seized as a substitute asset. Therefore, the jury's verdict does not preclude the district court's order forfeiting the property as a substitute asset. As the Government points out, the very nature of a subsitute asset requires that it is not property which is directly forfeitable. *See United States v. Swank Corp.*, 797 F.Supp. 497 (E.D. Va. 1992) (holding that an order of forfeiture for substitute assets has to be satisfied out of something which was not itself forfeitable).

III.

For the foregoing reasons, the district court's forfeiture order is AFFIRMED.

FILED
Oct 31 1995
LEONARD GREEN, CLERK

Case No. 94-6188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOM HENRY,

Defendant

JO-ANN HENRY,

Third Party Claimant-Appellant.

BEFORE: KRUPANSKY, MILBURN, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

LEONARD GREEN, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA	]	
	]	
VS.	]	**No. 3:91-00095**
	]	
TOM HENRY, et al.	]	

ORDER

On August 25, 1994, the Court held a hearing pursuant to 21 U.S.C. § 853(n) on Petitioner's ancillary claim on 101 Ewing Court, Lebanon, Tennessee.

The Court ordered the hearing in order to determine petitioner's share of 101 Ewing Court as a bona fide purchaser for value under § 853(n)(6)(B). At the hearing, Petitioner conceded that she is unable to demonstrate an interest in the property greater than the $23,951.20 which she personally invested toward its purchase. However, Petitioner argued that she has superior title in the property under § 853(n)(6)(A). The Court finds Petitioner's argument under § 853(n)(6)(A) to be without merit, but amends the order of forfeiture to reflect Petitioner's interest under § 853(n)(6)(B).

Accordingly, the Court hereby AMENDS the First Amended Preliminary Forfeiture Order (Doc. No. 313), and ENTERS a Final Forfeiture Order as follows:

Pursuant to 21 U.S.C. § 853(p), the below-listed property of Defendant Tom Henry is hereby

CONDEMNED and FORFEITED to the United in substitution for the $191,206.80:

1. 101 Ewing Court, Lebanon, Tennessee, including its buildings, fixtures, appurtenances, easements and fixtures, with the exception that a proportion of the property in the amount of $23,951.20 may not be forfeited;

2. Lot No. 23 of South Fork Estates, adjacent to 101 Ewing Court, Lebanon, Tennessee, including its buildings, fixtures, appurtenances, easements and fixtures;

3. $25,000 in currency restrained on or about August 14, 1992, at First American Bank located in Brentwood, Tennessee; and

4. All equity in State Farm Life insurance policy No. LF10182495, a whole life policy in the name of Tom Henry.

The above substitute property is forfeited up to the value of $191,206.80, said value ot be determined

by the net proceeds realized by the Government after the sale or other disposition of the substitute property and the disposition of any third party claims to the property. Any net proceeds from the sale or disposition of the substitute property that collectively exceed $191,206.80 shall be returned to the Defendant Henry.

ORDERED that the August 14, 1992 order restraining the Defendant Tom Henry and all business entities under his ownership and control from disposing of or selling any asset exceeding $1,000 in value without prior notice to the Government and approval of this Court, shall remain in effect until the $191,206.80 forfeiture judgment has been fully satisfied.

It is so ORDERED pursuant to 21 U.S.C. § 853(e) and (p) this the ____ day of August, 1994.

_____

John T. Nixon, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA	]	
	]	
VS.	]	**No. 3:91-00095**
	]	**JUDGE NIXON**
TOM HENRY, et al.	]	

FIRST AMENDED PRELIMINARY FORFEITURE ORDER

This matter came before the Court on the Government's motion to forfeit certain property of the Defendant Tom Henry in substitution for the $191,206.80 in money laundering proceeds that were forfeited to the United States on August 14, 1992. having reviewed the Government's motion, supporting affidavit and exhibits, as well as considering the relevant evidence presented at trial, this Court hereby

FINDS that the Defendant Henry has transferred or deposited the $191,206.80 in forfeited proceeds into the name of third parties; and this Court further

FINDS pursuant to Title 21, United States Code, Section 853(p) that below listed property is held by or on behalf of Defendant Tom Henry and the same is hereby CONDEMNED and FORFEITED to the United States in substitution for the $191,206.80 as follows:

1. 101 Ewing Court, Lebanon, Tennessee, including its buildings, fixtures, appurtenances, easements and fixtures

2. Lot No. 23 of South Fork Estates, adjacent to 101 Ewing Court, Lebanon, Tennessee, including its buildings, fixtures, appurtenances, easements and fixtures;

3. $25,000 in currency restrained on or about August 14, 1992, at First American Bank located in Brentwood, Tennessee; and

4. All equity in State Farm Life insurance policy No. LF10182495, a whole life policy in the name of Tom Henry.

The above substitute property is forfeited up to the value of $191,206.80, said value to be determined by the net proceeds realized by the Government after the sale or other disposition of the substitute property and the disposition of any third party claims to the property. Any net proceeds from the sale or disposition of the substitute property that collectively exceed $191,206.80 shall be returned to the Defendant Henry.

It is further **ORDERED** that the United States Attorney General or his authorized designee shall seize and dispose of the above substitute property in accordance with law. Fed. R. Crim. P. 32 (b)(2); and it is further

ORDERED that the August 14, 1992 order restraining the defendant Tom Henry and all business entities under his ownership and control from disposing of or selling any asset exceeding $1,000 in value without prior notice to the government and the approval of this Court, shall remain in effect until the $191,206.80 forfeiture judgment has been fully satisfied.

It is so **ORDERED** pursuant to Title 21, United States Code, Section 853(e) and (p) this 25th day of November, 1992.

_____

John T. Nixon
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA	]	
	]	
VS.	]	**No. 3:91-00095**
	]	**JUDGE NIXON**
TOM HENRY, et al.	]	

PRELIMINARY FORFEITURE ORDER

A jury having found the defendant Tom Henry guilty of Counts Six through Thirteen in the above-styled case on June 23, 1992, and thereafter said jury having found that $191,206.80 in United States currency and all interest and proceeds traceable thereto were involved in or were traceable to money laundering violations under Title 18, United States Code, Sections 1957 as charged in Counts Six through Thirteen, it is hereby

ORDERED, ADJUDGED AND DECREED that $191,206.80 in United States currency and all interest and proceeds traceable thereto are CONDEMNED and FORFEITED to the United States. Title 18, United States Code, Section 982(a)(1). It is further

ORDERED that the United States Attorney General or his authorized designee shall seize and dispose of the said monies in accordance with law. Fed. R. Crim. P. 32(b)(2).

The United States shall publish notice of this Order pursuant to Title 21, United States Code, Section

853(n)(1), as incorporated by Title 18, United States Code, Section 982(b)(1)(A).

ORDERED this 14th day of August, 1992.

JOHN T. NIXON
United States District Judge

APPROVED FOR ENTRY:

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